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No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1952

ALSTATE CONSTRUCTION COMPANY, PETITIONER

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR RESPONDENT

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OPINIONS BELOW

The opinion of the district court (R. 7-17) is reported in 95 F. Supp. 585. The opinion of the court of appeals (R. 86-90) is reported in 195 F. 2d 577.

JURISDICTION

The judgment of the Court of Appeals was entered April 9, 1952 (R. 91). Petition for rehearing was denied May 5, 1952 (R. 92). On July 11, 1952, the time for filing a petition for writ of certiorari

was extended to August 29, 1952. The petition was filed August 27, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Are employees who regularly engage in the preparation and hauling of materials and road-mixes to be used in the repair, reconstruction, extension, and maintenance of interstate highways, roads and railroads "engaged in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act?

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 as amended by the Fair Labor Standards Amendments of 1949 (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; 29 U.S.C., Supp. V, 201) are:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several states or between any State and any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in pro-

ducing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

SEC. 7 (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Petitioner is engaged in resurfacing existing highways, public roads, and streets used to a substantial extent by interstate traffic (R. 29, 38). As the district court found, petitioner's "road work, covered by contracts with the Commonwealth of Pennsylvania and many of its political subdivisions, involved no completely original construction; it consisted entirely in some form of resurfacing of previously existing roads, either interstate as such or connecting with an interstate system, with the slight exception involved in the straightening of old road lines * * *" (R. 15). "A typical case would be a through highway carrying a State and frequently a United States highway number. It may originally have been dirt, but it was none the less a part of an interstate system of highways." (R.

15-16.) Resurfacing frequently also included patching and other preliminary repair on the existing roadbeds (R. 66), eliminating hills (R. 13), and widening curves and shoulders.

The trial court found that eighty-five and one-half percent (85.5%) of petitioner's total output "was directed toward the improvement of various interstate facilities" (R. 17). Petitioner's contracts with the State and its political subdivisions totaled $825,025.83, or over 70 percent of its total business of $1,172,276.70 during the three and one-half years examined (computed from table in stip., R. 31). Over 15 percent of petitioner's business ($177,589.47 in the same period) was with interstate railroads and industrial concerns (*ibid.*). Petitioner's "industrial and railroad work was in each cited instance done for the improvement of the facilities of concerns engaged in interstate commerce" (R. 15). Less than 15% of the business, characterized as "private" work, apparently involved no interstate activity (R. 15).

Petitioner's headquarters is at Harrisburg, Pennsylvania, and it conducts its operations through its plants at Hanover, Cressona, and Naginey (R. 27) as "component parts of an integrated unit" (R. 16). Except for the relatively small amount of "private" work, each of the three plants participated substantially in each of the types of business listed above in each of the years examined (R. 31).

In the resurfacing operations undertaken by all three of petitioner's plants, the ingredients are

combined to produce the material applied on the existing roadbeds, a bituminous concrete substance known as amesite (R. 28). The close integration which the district court found between the production of this material at the three plant sites and its application to the roads is illustrated in many ways. All of petitioner's work in applying the resurfacing materials, whether for the State, its political subdivisions, commercial, or industrial customers, is pursuant to contracts calling for a completed result involving both the labor and the materials (R. 29). Except for such commercial customers as may happen expressly to require a different mixture, all of the amesite is mixed in accordance with specifications required by the Pennsylvania Department of Highways, and the State has inspectors present at the plant sites at all times to assure conformity with the specifications (R. 70). Most significantly, it is stipulated that "Except for certain types of material used for patching purposes in the winter season, practically all of the bituminous concrete material produced at Alstate's three plants is applied to highways, roads, etc. immediately after production" (R. 40). Moreover, the testimony of the employees reveals that the plant sites were the headquarters of the employees working on the roads as well as those mixing the amesite (R. 48, 54), and, indeed, there was no segregation but rather considerable interchange between employees performing their duties at the plants and at the road sites (R. 48-56, 60-62).

It is stipulated that there was no segregation at

any of the three plants among petitioner's employees mixing the bituminous concrete materials or applying them according to the interstate or local uses to which those materials were put (R. 39). Nor was there any segregation among truck drivers attached to the Cressona and Naginey plants as to the interstate or local uses of the materials at the job sites to which they hauled them (R. 12, 39-40).

Both courts below held that the employees in question were within the coverage of the Act, rejecting petitioner's contention that a distinction should be drawn between so-called "on the road" and "off the road" employees. The district court concluded "that the various plants of the defendant were all component parts of an integrated unit, eighty-five and one-half percent of whose total output was directed toward the improvement of interstate facilities, and that all of the employees of the defendant are definitely within the scope of the statute" (R. 11, 16-17). The judgment enjoined petitioner from violating the overtime requirements of the Act with respect, specifically, to "any of its employees engaged in commerce or in the production of goods for commerce, within the meaning of the Act" (R. 22-23).

ARGUMENT

The decision below correctly applies the principles established by this Court's decisions and does not conflict with the decision of any United States court of appeals. In these circumstances, although the case involves an important question as to the application of the Act, it does not present

any problem which may not be resolved by applying principles already well settled. In view, however, of the fact that it is in conflict with the decision of the Pennsylvania Supreme Court in *Thomas* v. *Hempt Bros.*, 371 Pa. 383, 89 A. 2d 776, we do not oppose certiorari.

1. In holding that employees performing work specifically for and essential to the maintenance, repair and improvement of instrumentalities of interstate commerce are covered by the Act, whether such work be "on the road" or "off the road," the decision below correctly applied principles well established by decisions of this Court and other courts of appeals. In *Overstreet* v. *North Shore Corporation*, 318 U.S. 125; *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U.S. 740, modified and petition for rehearing denied, 318 U.S. 742; and *Fitzgerald Co.* v. *Pedersen*, 324 U.S. 720, employees engaged in the maintenance, repair, reconstruction and improvement of interstate instrumentalities were held to be "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it.' " *Overstreet*, 318 U.S. at 130; *Pedersen*, 318 U.S. 740, and 324 U.S. at 724-725. The "practical considerations" underlying this ruling were that their work is "vital to the proper functioning of these structures as instrumentalities of interstate commerce" (see *Overstreet*, 318 U.S. at 128, 130) and "because without their service these instrumentalities would not be open to the passage of goods and persons across the state lines" (*ibid.*).

These principles have been applied by a con-

sistent line of decisions of the courts of appeals holding employees engaged in maintenance, repair and improvement of interstate instrumentalities to be "in commerce" even though "off the road". See *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, 337 (C.A. 9) (holding the Act applicable to "white collar" workers physically removed from the instrumentality on which the construction was being done); *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C.A. 2) (holding the Act applicable to estimators and draftsmen performing preparatory paper work preliminary to the actual construction work on the instrumentality); *Bennett* v. *Loftis Co.*, 167 F. 2d 286 (C.A. 4) (holding covered a watchman employed to guard the construction of a new bridge which had never carried interstate traffic and was some distance removed from the highways then being used to carry such traffic, but which when completed was to connect with roads leading to interstate highways).

The work of the employees in the instant case in preparing the very material specified in the construction contract for repair of existing instrumentalities of interstate commerce is no less vital a part of the commerce than the work of the employees in the above cited cases. Just as the white collar employee who performs drafting, estimating and other necessary preliminaries to repair of facilities of commerce is "in commerce," so is the manual worker who, as part of an integrated operation, prepares the material which his co-workers

apply to the facilities of commerce. The preparation and hauling of materials and road mixes needed for specific road repairs are just as indispensable to the proper functioning of the instrumentalities of commerce as is the physical application of that material to the roads. In the instant case this is particularly true. There was ample support in the undisputed evidence for the trial court's finding that the functions at petitioner's mixing plants were "all component parts of an integrated unit" (R. 16). The vital part the mixing operation plays in the completed project is constantly recognized in petitioner's day-to-day dealings with the State. This function is considered so important as to be a matter of detailed specification in the road repair contract and requires the constant presence of State inspectors at petitioner's plants to assure proper observance of these specifications (R. 70).

Accordingly, we think the employees in question were "in commerce." But if not "in commerce," they were certainly engaged in "production of goods for commerce," as the court below held. If, as this Court has held, the maintenance and repair of instrumentalities of interstate commerce constitute an integral part of such commerce, it would seem to follow, literally and logically, that the production of materials for that specific purpose is production of goods "*for* commerce" (emphasis supplied). The word "for" is a word "of ordinary speech" to be given all the meaning it has "in ordinary intercourse in this context." See *Western*

Union Telegraph Co. v. *Lenroot*, 323 U.S. 490, at 503. The popular understanding and dictionary definition of the word "for" includes "to serve as, or as part of; to supply the need of; in order to effect." *Webster's New International Dictionary*, 1948 Ed., p. 984. As the road material here is stipulated to have been produced, directly and specifically, "for use in the construction, extension, repair, resurfacing, reconstruction, and maintenance of existing [interstate] highways" (R. 39), it follows that its production is "for commerce" within the plain ordinary meaning of those words.[1]

This construction follows long-standing decisions of courts of appeals dating back to 1942 in the so-called "ice cases". *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5), which "affirmed throughout" the "thoughtful and carefully worked out opinion" of District [now Circuit] Judge Russell, 40 F. Supp. 654, N.D. Ga.; followed by the Sixth Circuit in *Chapman* v. *Home Ice Co.*, 136 F. 2d 353, certiorari denied, 320 U.S. 761. To the same effect see *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5); *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C.A. 6); *Hansen* v. *Salinas Valley Ice Co.*, 62 Cal. App. 2d 357, 144 P. 2d 896 (1944).

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[1] This has long been the position of the Administrator. Release A-14, issued March 1945, 1945 W. H. Man. 1497, and repeated in his General Statement as to the Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, issued July 1947, 29 CFR, 1947 Supp., Part 776, (12 F.R. 4583), Section 776.7 paragraph (c); incorporated in Interpretative Bulletin, General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as amended, 29 C.F.R., c. V, Part 776, subpart A, May 1950 (15 F.R. 2925).

See also *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied, 317 U.S. 634. These principles were most recently applied in the decision of the Eighth Circuit in *Tobin* v. *Johnson*, 11 WHC 38, (not officially reported), petition for certiorari pending, No. 336, this Term, which followed the decision in this case to hold that "off the road" quarry workers producing material for use in the repair and maintenance of interstate instrumentalities were engaged in the production of goods for commerce.

Petitioner's attempted distinction between "off the road" and "on the road" employees finds no support in the decisions of this Court or other federal courts. As this Court re-emphasized in its most recent decision construing this Act, "the Act declared its purpose in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality * * *. Where exceptions were made, they were narrow and specific. * * * Such specificity in stating exemptions strengthens the implication that employees not thus exempted * * * remain within the Act." *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516-517.

There is plainly no exemption in the Act for employees who work "off the road." And neither the statutory language nor its purposes warrant any such distinction. Thus this Court has repeatedly held the Act applicable to employees who do not physically work on the instrumentality of interstate commerce or physically handle the goods pro-

duced for commerce. See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, affirming the ruling of the Fifth Circuit applying the "in commerce" coverage to those who "write the letters, keep the books [off the road]," as well as to those who "load and unload or drive the trucks [on the road]." 128 F. 2d 395, 398; *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, rehearing denied, 317 U.S. 706, holding an "off the road" rate clerk for an interstate motor carrier to be "engaged in commerce." See also cases cited *supra*, p. 8. Similarly in *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, and *Borden Co.* v. *Borella*, 325 U.S. 679, the "production of goods for commerce" coverage was applied to custodial and maintenance employees who had no physical contact with the goods which moved in commerce. The employees held covered in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, were engaged in repairing electrical motors and equipment for use in the production of other goods to be shipped in commerce and did not physically handle such goods so shipped. In all of these cases the crucial consideration was not the physical location of the worker or the work done, but its direct, intimate and necessary relationship to commerce or the production of goods for commerce.

2. In support of its contention that the decision below is "contrary to the decisions of this" Court (petition, p. 11), petitioner cites only *McLeod* v. *Threlkeld*, 319 U.S. 491, holding the Act inapplicable to a cook employed by an independent contractor to prepare meals for railroad maintenance employees. The *McLeod* decision plainly has no

pertinence here. It was because the cook "supplies the personal needs" only of the employees, that is, food which is "consumed apart from their work," as this Court expressly stated, that the Act was held inapplicable to him. 319 U.S. at 497. The reasons for that decision, therefore, can have no application to employees who furnish the very material specified in the construction contract for the maintenance of the interstate instrumentality itself. In short, the cook in the *McLeod* case did not produce goods to supply the needs of commerce, but only to supply "the personal needs" of the employees "apart from their work."

The decision below does not conflict with that of any other court of appeals. On the contrary, it accords with a consistent line of decisions of at least four circuits—the Third, Fifth, Sixth, and Eighth. Both circuits which have ruled on the specific issue of coverage of so-called "off the road" workers producing materials for the repair and maintenance of interstate instrumentalities (the court below here and the Eighth Circuit) have reached the same result by unanimous decisions. See *Tobin* v. *Johnson*, 11 WHC 38, petition for certiorari pending, No. 336, this Term. And at least two other circuits have expressly adopted the rationale applied by the court below. *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5); *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5); *Chapman* v. *Home Ice Co.*, 136 F. 2d 353 (C.A. 6), certiorari denied, 320 U.S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C.A. 6); see also *Hamlet Ice Co.* v.

Fleming, 127 F. 2d 165 (C.A. 4), certiorari denied, 317 U.S. 634.

In the case of *E. C. Schroeder* v. *Clifton*, 153 F. 2d 385 (C.A. 10), certiorari denied, 328 U.S. 858, rehearing denied, 329 U.S. 821, on which petitioner relies as presenting a conflict among the circuits, only one of the three participating Judges rejected the rationale of the above decisions. The opinion from which petitioner quotes as the opinion of "the court" (petition, p. 13), is the opinion of Judge Bratton only. 153 F. 2d at 387, 391. Judge Huxman dissented, voting to affirm the judgment of the district court that the Act applied to employees producing gravel for railroad and road construction (*id.*, at 394). The deciding vote was cast by Judge Phillips, who explicitly refrained from controverting the rationale of the *Atlantic Co.* case and the other similar decisions,[2] stating that in his

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[2] Judge Phillips' opinion rested on the assumption that the *Schroeder* case involved "new construction" which was outside the scope of the Act. *Cf.* the later and more carefully reasoned decisions holding that construction of new segments of existing roads and railroads is not original construction but is covered by the Act as repair and maintenance work. *Walling* v. *McCrady Const. Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785, and *Bernett* v. *Loftis Co.*, 167 F. 2d 286 (C.A. 4). Thus the result reached by Judge Phillips, though contrary to the result reached in the instant case, does not reflect a conflict in principle warranting certiorari, in view of the fact that neither the petition in this case, nor in the *Johnson* or *Hempt Bros.* cases, presents any issue regarding the proper classification of construction as original on the one hand or as repair and reconstruction on the other. It may be noted that this Court denied certiorari in the *Schroeder* case, 328 U.S. 858, rehearing denied, 329 U.S. 821, despite the reliance of the cross petitioner in that case upon the conflict between Judge Bratton's opinion and the Fifth Circuit's opinion in the *Atlantic Co.* case (see No. 1237, October Term, 1945, petition of *Clifton, et al.*, pp. 8-10).

view the doctrine of those cases had no application to the facts of the *Schroeder* case and resting his decision on a wholly different ground. 153 F. 2d at 391, 393.[3]

Although the rule in the federal courts thus appears settled, the decision of the Supreme Court of Pennsylvania in *Thomas* v. *Hempt Bros.*, 371 Pa. 383, 89 A. 2d 776, expressly declined to follow the decision of the Third Circuit in the instant case. The single employee there involved was engaged in producing and handling sand, stones and cement, loading those materials on trucks, and giving directions for their delivery to the Pennsylvania Turnpike, an airport, a railroad, and military depots.

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[3] The 1949 Amendments to the Fair Labor Standards Act, to which petitioner refers (Pet., p. 14) as supporting the *Schroeder* decision, have no bearing on the issue here presented. The House Managers' Report, H. Rep. No. 1453, 81st Cong., 1st Sess., from which petitioner quotes, refers only to that part of the *Schroeder* decision relating to the quarrying of rock for construction of a dike to protect from flooding an oil field producing oil for commerce. Coverage of this work depended upon the portion of Section 3(j) of the Act covering "any process or occupation necessary to the production" of goods to be shipped in commerce. This phrase of Section 3(j) of the Act was amended by the 1949 Amendments so as to read "any closely related process or occupation directly essential to the production." Neither the House Manager's report nor anything else in the legislative history made any reference to the issue of coverage of production of materials for use in the repair of interstate roads and instrumentalities, which is the issue here presented.

Coverage in the instant case rests not upon the ground that the work in question is an occupation "necessary to" or "closely related and directly essential to" production of other goods for interstate commerce, but on the ground that the preparation of materials specifically for use in repair and maintenance of instrumentalities of commerce is a part of such commerce or is production directly "for commerce," without reference to the amended phrase.

While the facts are not entirely clear from the opinion, the decision would appear basically in conflict with the decision below, as the Pennsylvania court expressly recognized. We understand that a petition for certiorari will be filed in that case. We think that if this Court is to consider the issues on which the Pennsylvania court differed with the court below, it is important that it have before it the present case, which comes up on a much more complete record after trial in an action in which the Government agency responsible for the administration and enforcement of the Act is a party.[4]

Accordingly, we do not object to the granting of the writ in the present case.

Respectfully submitted,

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OCTOBER, 1952.

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[4] The *Hempt* decision was rendered solely on the pleadings without trial. Hence it is not impossible that this Court, should it grant certiorari in the *Hempt* case, might after argument find it necessary to remand the case for "amplification of the record." *Kennedy* v. *Silas Mason Co., et al.*, 334 U.S. 249, 257; *Murphy* v. *Reed*, 335 U.S. 865.

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